Supreme Court, U.S.
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No. 96-471

IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

CLARENCE E. MILLER, *et al.*,

Appellants,

v.

STATE OF OHIO, *et al.*,

Appellees.

On Appeal from the United States District Court for the Southern District of Ohio, Eastern Division

APPELLANTS' BRIEF OPPOSING APPELLEES' MOTION TO DISMISS OR TO AFFIRM

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RESPONSE TO APPELLEES' MOTION

THE PRINCIPLE OF GOVERNMENTAL NEUTRALITY

As the lower Court recognized and as appellants demonstrated, the principle that "the State must govern impartially"[1] has been applied to free speech, freedom of association and freedom of religion. This principle governs equal access to the Courts[2] and to the voting booth. Preventing the government from targeting individuals for invidious treatment is the basis for our Constitutional prohibition of bills of attainder and ex post facto laws[3]. This principle has also been applied in a variety of cases involving the electoral process[4]. Congressman Miller and the other appellants here ask this Honorable Court to now apply this well-established principle to the drawing of Congressional district boundaries. The lower Court's characterization - that the concept of government as neutral referee "has not yet been recognized as a discrete constitutional right"[5] as applied to district boundaries - cries out for such a consideration.

The State simply does not address the validity of judging this case against the principle of governmental neutrality or

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[1] *New York City Transit Authority v. Beazer*, 440 U.S. 568, 587 (1979), quoted at Jur. St. 8.

[2] *E.g., Boddie v. Connecticut*, 401 U.S. 371 (1971).

[3] U. S. Constitution, Article I, Section 9.

[4] Jur. St. 10-11, most recently in *Romer v. Evans*, ____ U.S. ____, 116 S.Ct. 1620 (1996).

[5] Jur. St. at A-12 (emphasis added).

impartiality. It merely urges the Court to exercise "restraint in the creation of new constitutional rights."[6]. But this is not a new right. It is the application to a new question of a well-established and well-recognized principle of governmental evenhandedness.

The Jurisdictional Statement at pp. 8-12 show that this right is not "completely without foundation or precedent."[7] To the contrary, it fulfills and extends rights long established by this Honorable Court. Nor is the right sought "totally without boundary or contour."[8] The right is simply the right to receive evenhanded treatment from state legislatures engaged in drawing boundaries for federal office, namely, membership in the United States House of Representatives.

DIRECT ELECTION OF REPRESENTATIVES

The State has one note and one note only to play in response to the appellants' argument based on Article I, Section 2 and 4 and the First and Fourteenth Amendment of the Constitution: *Gaffney*[9] gives us the right to gerrymander.

Using the debates of the Constitutional Convention, appellants have shown that "The Framers did their best to insulate Congressional elections from state legislative

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[6] Appellees' Motion to Dismiss or to Affirm ("Motion"), at 25.

[7] Motion, p. 25.

[8] Motion, p. 25

[9] *Gaffney v. Cummings*, 412 U.S. 735 (1973), discussed at Motion, 17-19 and also cited at 6, 12, 16, 21 and 25.

machinations."[10] According to the State, original intent means nothing in the face of *Gaffney*. Yet *Gaffney* has no bearing on this case, for a number of reasons:

1. It involved a state legislative reapportionment. The role of the federal courts in reviewing a state's establishment of its own state legislative boundaries is necessarily limited and is entirely different from its role in reviewing a state's Congressional line drawing, which involves a purely federal office. The dichotomy between these two roles has been consistently maintained[11]. *Gaffney's* majority opinion, by Justice White, specifically adopted the Court's conclusions in *Mahan v. Howell*[12] :

> We concluded that there are fundamental differences between congressional districting under Art. I and the Wesberry line of cases on the one hand, and, on the other, state legislative apportionments governed by the Fourteenth Amendment and Reynolds v. Sims [citation omitted] and its progeny.[13]

2. *Gaffney* involved a claim of partisan bias: "The Complaint

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[10] Jur. St. 13-18, quotation from 18.

[11] *Mahan v. Howell*, 410 U.S. 315, 322, quoted in *Gaffney*, 412 U.S. at 742.

[12] 410 U.S. 315 (1973).

[13] *Gaffney v. Cummings*, 412 U.S. 735, 741-742 (emphasis added), discussed at Jur. St. A-98 - A-99.

further alleged the plan amounted to a political gerrymander and contained 'a built-in bias in favor of the Republican Party."[14] J. Brian Gaffney, Chairman of the State Republican Party, intervened to defend the plan against this charge[15]. If *Gaffney* had been filed today, it may well have been judged by the criteria established in *Davis v. Bandemer*[16] for evaluating partisan gerrymanders in state legislatures[17].

3. The *Gaffney* plaintiffs alleged group rights to political representation while the *Miller* plaintiffs assert individual rights. Clarence Miller the individual was harmed when his district was shattered and he went down to the defeat which had been planned for him. The fact that he lost by a "razor-thin margin"[18] is a red herring: He lost. He is asserting here his individual right to participate in an impartial, nondiscriminatory election process. Plaintiff Thomas Erney, a Democrat, was individually harmed when the 1992 Ohio redistricting increased the Republican majority in Congressional District 15, for the purpose of deterring him or other challengers from opposing

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[14] 412 U.S. at 739 (emphasis added).

[15] Id.

[16] 478 U.S. 109 (1986).

[17] The State spent fully one-fifth of its Motion setting up the straw man of *Bandemer* only to knock it down again (Motion, pp. 19-24). As appellants have repeatedly stated, that case is inapposite because it confronted only a partisan [not bi-partisan] attack on a state [not federal] redistricting based on group [not individual] rights. (Jur. St. 19, f.n. 58: *Bandemer's* limited purpose is to prevent any single party from becoming so deeply entrenched that there is no reasonable hope of challenging the party machine.)

[18] See Motion, 23; Complaint, Jur. St. A-37; Order below, Jur. St., A-11.

incumbent Representative Wylie[19]. Each of the other individual plaintiffs has raised violations of his or her rights as individuals in this case. The Libertarian Party asserts the rights of those individual "members, candidates and potential candidates for Congress representing the Libertarian Party and other minor parties similarly situated"[20].

Finally, *Gaffney* was decided at a time when the Court believed that extirpating politics, that is to say, discretion, from redistricting decisions was impossible[21]. That is no longer true. Because of the vastly improved detail with which Census results are now reported, the advances in computers and programming and the development of impartial procedures for district line drawing by several experts in the field, the ancient evil of gerrymandering can today be cured, by adopting impartial districting procedures that remove discretion and, with it, the opportunity to engage in discriminatory districting (gerrymandering).[22] The original intent of the Framers can now be realized, for perhaps the first time.

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[19] Complaint, Jur. St. at A-39.

[20] Complaint, Jur. St., A-49 - A-50 (emphasis added).

[21] *Gaffney v. Cummings*, 412 U.S. 735, 754 (1973).

[22] Appellees state that appellants seek the adoption of a fair process devoid of any political considerations (which is true) but they then further state that appellants ask that "the federal courts thereafter engage in a "fairness" review of the results of that process (*i.e.*, presumably the electoral results)". Motion, 15. That is not true. Once the state's adopted procedure for drawing district lines is determined to be impartial and not subject to discretionary gerrymandering, the Court's review has ended. The electoral results need not be reviewed.

Former Congressman Miller and the other appellants rely on the interpretation of Article I Section 2 announced in *U. S. Term Limits v. Thornton*[23], a decision completely ignored by the State in its Motion. *Thornton* reaffirmed "the critical postulate that sovereignty is vested in the people, and that sovereignty confers on the people the right to choose freely their representatives to the National Government."[24] This Court then declared,

> [T]he Framers understood the Elections Clause as a grant of authority to issue procedural regulations, and not as a source of power to dictate electoral outcomes, to favor or disfavor a class of candidates, or to evade important constitutional restraints.[25]

Appellants argue that that Clause not only forbids favoring or disfavoring a class of candidates, but even more so the favoring or disfavoring of specific individual candidates, as they all allege was done by Ohio in 1992.

ONE PERSON, ONE VOTE

The State offers three reasons why *Wesberry v.*

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[23] 115 S.Ct. 1842 (1995).

[24] 115 S.Ct. at 1851, quoting from *Powell v. McCormack*, 395 U.S. 486 (1969).

[25] Id., at 1869. This is true whether holding an election for federal office under Article I, Section 2 is a delegation of power to the state (Id., at 1855-56 [majority opinion]) or the imposition of a duty (Id., at 1883 [dissent of Thomas, J., joined by The Chief Justice, O'Connor, J., and Scalia, J.]).

Sanders[26] and its progeny do not require a trial in this instance. All three are wrong.

The third reason[27] was that "Appellants do not seek the only remedy that would be available under *Karcher*... - a plan with precise mathematical equality."[28] That claim misreads *Karcher*. The State correctly recognizes that appellants have no interest in replacing a nearly equi-populous gerrymander with an exactly equi-populous one. *Karcher*, however, does not require that result but rather speaks of "consistently applied legislative policies [that] might justify some variance, ..." "As long as the criteria are nondiscriminatory, ..."[29]

What, exactly, is a "consistently applied nondiscriminatory policy"? Appellants argue that it certainly is not a policy that discriminates against Congressional challengers but in favor of incumbents, nor a policy that discriminates against incumbent Clarence Miller but in favor of other incumbents. Rather, it is a policy, enacted into law, that *optimizes* the "traditional" and "objective" districting criteria of contiguity, compactness and non-fragmentation of local governmental units and balances them with population equality

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[26] 376 U.S. 1 (1964).

[27] Motion, Section I.C., at 14-15.

[28] Motion, 5 (emphasis added). See also Motion, 14.

[29] *Karcher v. Daggett*, 462 U.S. 725, 740 (1983).

to achieve an impartial districting procedure[30].

Appellants' counsel correctly commented that if district "lines were drawn according to a consistently applied standard that reflects a valid State interest", and those lines - whether generated by a computer or a "man from Mars" - produced exactly the same map that the 1992 redistricting produced, that map would have no Constitutional infirmity[31].

The State also argued that the "minuscule" differences in population among districts do not violate *Karcher*[32]. This has already been addressed in Jur. St. 23-28. The State does not explain how its position could be reconciled with *Karcher*'s own words, "that there are no de minimis population variations, which could practicably be avoided, but which nonetheless meet the standard of Art. I, [Section] 2, without justification."[33] Nor is the State's position consistent with *Kirkpatrick v. Preisler's*

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[30] See characterization of these criteria in *Shaw v. Reno*, 509 U.S. 630, 113 S.Ct. 2816, 2827 (1993). They are called "neutral and legitimate criteria" by which "district lines should be determined" in *Davis v. Bandemer*, 478 U.S. 109, 166 (1986), Powell, J., dissenting. The *Reynolds* court had said "A state may legitimately maintain the integrity of ... political subdivisions ... and provide for compact districts." 377 U.S. 533, 578 (1964). Justice White spoke of the virtues of compactness , *Wells v. Rockefeller*, 394 U.S. 542, 555 (1969), White, J., dissenting. In defining gerrymandering as the "distortion of district boundaries" Justice Fortas implies that *non*-distorted (*i.e.*, compact) boundaries were a legitimate criterion for districting. *Kirkpatrick v. Preisler*, 394 U.S. 526, 538 (1969), Fortas, J., concurring.

[31] Motion, 14, A-3.

[32] Motion, 5, Section I.A. at 7-11.

[33] *Karcher v. Daggett* at 734, quoted in Order, Jur. St. A-7 - A-8, and at Jur. St. 25.

requirement that "the State must justify each variance, no matter how small."[34] Appellants' position has consistently been that the Equal Protection Clause as interpreted in *Wesberry*, *Kirkpatrick* and *Karcher* requires a trial to test the State's reasons for adopting these variations. The State's Motion fails to even mention one crucial fact: The State legislature had before it four plans with exactly equal population, but chose to reject all four. Despite the State's concern, eliminating all variances did not require any households be divided[35]. Equi-populous districting was practicable and the State must explain why it was not done.

The State's second argument is the weakest: Even if justification is needed, plaintiff's Complaint supplies it[36]. In deciding a Rule 12(b)(6) Motion, all facts alleged in the Complaint are construed in the light most favorable to plaintiffs[37]. The State wishes to turn this on its head to construe all facts in the Complaint in the light most unfavorable to plaintiffs and favorable to the State. This effort must fail. Merely admitting that the State only tried to return some but not all[38] incumbent Representatives destroys the argument that

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[34] *Kirkpatrick v. Preisler*, 394 U.S. 526, 530-531 (1969), discussed at Jur. St. 24-25.

[35] Motion, 9.

[36] Motion, Section I.B., at 11-14.

[37] *Newman v. Voinovich*, 789 F.Supp. 1410, 1415 (S.D.Ohio 1992), aff'd. 986 F.2d 159 (6th Cir. 1993).

[38] Motion, 12-13: State "protected almost all of the incumbents"; "preserved some but not all incumbents". How and why was that done and by whom requires a trial to establish.

"incumbent protection" was the consistently applied state interest justifying the variations. The State engineered two primary battles between pairs of incumbents, destroying the argument that "preventing incumbent contests" was the consistently applied legitimate state interest justifying the variances. How the State "attempted to maintain the balance in the Ohio congressional delegation between Republicans and Democrats,"[39] if it did, requires a trial to test whether that was a consistently applied legitimate state interest. Even if the asserted interests were legitimate, a trial is needed to see if any of the four rejected equi-populous plans would have substantially vindicated them[40]. Thus a trial is required even if the State's asserted interests were Constitutionally legitimate, which appellants deny.

For each of the above reasons and for all of them, appellants urge this Honorable Court to deny the State's Motion to Dismiss or to Affirm, reverse the lower Court's Order and remand this case for trial.

Respectfully submitted,

David V. Stivison

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[39] Motion, 13.

[40] "This Court must also consider whether any other plans with lesser population variances are available that would substantially vindicate the State's interests." *Stone v. Hechler*, 782 F.Supp. 1116, 1126 (N.D.W.Va. 1992),